91

(5)

No. 07-948

FILED
APR 9 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

NATIONAL CASUALTY COMPANY,
Petitioner,

v.

LOCKHEED MARTIN CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

DAVID C. FREDERICK
W. DAVID SARRATT
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M STREET, N.W.
SUITE 400
WASHINGTON, DC 20036
(202) 326-7900

JAMES W. BARTLETT, III*
ALEXANDER M. GILES
SEMMES, BOWEN & SEMMES
250 WEST PRATT STREET
16TH FLOOR
BALTIMORE, MD 21201
(410) 539-5040

MATTHEW C. CRANE
BAUER MOYNIHAN & JOHNSON LLP
2101 FOURTH AVENUE, SUITE 2400
SEATTLE, WA 98121
(206) 443-3400

**Counsel of Record*

April 9, 2008

RULE 29.6 DISCLOSURE

Petitioner's disclosure pursuant to Rule 29.6 was set forth at page iii of the petition for a writ of certiorari, and there are no amendments to that disclosure.

TABLE OF CONTENTS

RULE 29.6 DISCLOSURE i

TABLE OF AUTHORITIES iii

ARGUMENT:

I. THERE IS A CLEAR CONFLICT AMONG THE CIRCUITS AS TO WHETHER A DEFENDANT CAN NULLIFY A PLAINTIFF'S ELECTION TO FILE A DUAL-JURISDICTION CASE IN ADMIRALTY AND PROCEED WITHOUT A JURY 2

A. The Fourth Circuit's Decision Conflicts With *Harrison* 3

B. The Fourth Circuit's Decision Conflicts With *Waring* 5

C. The Fourth Circuit's Decision Conflicts With Traditional Admiralty Practice, Which The Current Rules Were Intended To Preserve 6

II. A DECLARATORY JUDGMENT ACTION IS NOT IMMUNE FROM THE RULE THAT A JURY TRIAL IS NOT AVAILABLE IN ADMIRALTY 8

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

American-Foreign S.S. Corp. v. United States,
291 F.2d 598 (2d Cir.), *cert. denied*,
368 U.S. 895 (1961) 9

Beacon Theatres, Inc. v. Westover,
359 U.S. 500 (1959) 1, 6, 10

Brunson v. Iowa Home Mut. Cas. Co.,
224 F.Supp. 592 (S.D. Ala. 1963)..... 11

Cia Aeolia de Naveg. S.A. Panama v. John T. Clark & Son of Boston, Inc.,
250 F.Supp. 808 (D. Mass. 1964) 11

Great Lakes Reinsurance (UK) plc v. Masters,
No. 8:07-cv-1662-T-24-MSS, 2008 WL
619342 (M.D. Fla. Mar. 3, 2008)..... 3, 5

Harrison v. Flota Mercante Grancolombiana, S.A.,
577 F.2d 968 (5th Cir. 1978) 2, 3, 4, 11

Insurance Co. of Pennsylvania v. Amaral,
44 F.R.D. 45 (S.D. Tex. 1968)..... 11

Koch Fuels, Inc. v. Cargo of 13,000 Barrels of No. 2 Oil,
704 F.2d 1038 (8th Cir. 1983) 2

Marine Transp. Lines, Inc. v. Nunes,
211 F.Supp. 156 (N.D. Cal. 1962) 11

McLain v. Lance,
146 F.2d 341 (5th Cir. 1944), *cert. denied*,
325 U.S. 855 (1945) 8

Providence Washington Ins. Co. v. Lovett,
119 F.Supp. 371 (D.R.I. 1953) 9

Risdal v. Universal Ins. Co.,
232 F.Supp. 472 (D. Mass. 1964) 11

Shinnihon Kisen, K.K. v. Jarka Corp.,
1964 A.M.C. 1455 (D. Mass. 1964) 11

States Marine Lines, Inc. v. United States,
196 F.Supp. 562 (N.D. Cal. 1960) 9

Streckfus Steamers v. Mayor of Vicksburg,
81 F.2d 298 (5th Cir. 1936) 8

Waring v. Clarke,
46 U.S. (5 How.) 441 (1847) 2, 3, 5, 6, 11

Wilmington Trust v. United States District Court for the District of Hawaii,
934 F.2d 1026 (9th Cir. 1991), *cert. denied*,
503 U.S. 966 (1992) 2

CONSTITUTION

U.S. Const., Seventh Amend. 1, 5, 6

STATUTES

Declaratory Judgment Act, ch. 512, 48 Stat. 955
(1934) (codified, as amended, at 28 U.S.C.
§§ 2201-2202) 8

RULES

Fed. R. Civ. P. 9 7

Fed. R. Civ. P. 9(h) 3, 6, 7, 8

Fed. R. Civ. P. 38 11

Fed. R. Civ. P. 38(e) 3, 6, 7, 8, 11

Fed. R. Civ. P. 57 ..... 10, 11

39 F.R.D. 69 (1966) 8

OTHER MATERIALS

29 Moore's Fed. Prac. (3d ed. 2008) 10

REPLY BRIEF FOR PETITIONER

This is an admiralty case in which admiralty jurisdiction and its procedures were invoked by the plaintiff (Petitioner here) as the basis upon which the district court could exercise jurisdiction. The question presented is whether, after a plaintiff elects to file a case in admiralty (and hence proceed without a jury), a defendant can nullify that election by filing a counterclaim and demanding a jury trial. There is a clear conflict among the circuits on this issue – acknowledged by the Fourth Circuit, by The Maritime Law Association of the United States, and by recent case law – that this Court should resolve.

Respondent puts the cart before the horse in its characterization of this case first as a declaratory judgment case and only secondarily as an admiralty case. The first question that must necessarily be answered is whether this case is one in admiralty or at law. When a claim can properly support either form of jurisdiction, the overwhelming tradition in American law has been to afford the choice to the party filing the case. Indeed, before the unification of admiralty courts and common law courts, the choice was literally *where* – in what court – to file the case. And, as set out below, the existing rules of procedure were intended to preserve that traditional practice. It has long been settled that, when a case is filed in admiralty, the Seventh Amendment right to trial by jury does not apply. Thus, contrary to Respondent's contentions, *Beacon Theatres* and other cases that turn on the application of the Seventh Amendment in *non-admiralty* cases are simply inapplicable here.

The question of whether a plaintiff's designation of a claim as one subject to admiralty jurisdiction is inviolable, even when an alternate basis for jurisdiction could have been invoked, was decided by this Court in *Waring v. Clarke*, 46 U.S. (5 How.) 441 (1847), and by the Fifth Circuit in *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968 (5th Cir. 1978). The Fourth Circuit's decision in this case conflicts with those decisions, as do the decisions of the Ninth Circuit in *Wilmington Trust v. United States District Court for the District of Hawaii*, 934 F.2d 1026 (9th Cir. 1991), *cert. denied*, 503 U.S. 966 (1992), and the Eighth Circuit in *Koch Fuels, Inc. v. Cargo of 13,000 Barrels of No. 2 Oil*, 704 F.2d 1038 (8th Cir. 1983).

Because the issue presented is of recurring significance, this Court should resolve that conflict.

I. THERE IS A CLEAR CONFLICT AMONG THE CIRCUITS AS TO WHETHER A DEFENDANT CAN NULLIFY A PLAINTIFF'S ELECTION TO FILE A DUAL-JURISDICTION CASE IN ADMIRALTY AND PROCEED WITHOUT A JURY

In filing this case, National Casualty Company relied upon admiralty jurisdiction and its procedures, even though there was an alternative basis for federal jurisdiction. Its decision to seek a declaratory judgment, on the other hand, was not jurisdictional – nor was it "unconventional" – it was simply a remedy available to it within admiralty jurisdiction.

The Fourth Circuit's decision to grant a writ of mandamus to Respondent, and to direct the district

court to try this case before a jury, conflicts both with the Fifth Circuit's decision in *Harrison* and with this Court's decision in *Waring*. The Fourth Circuit's decision also conflicts with the Federal Rules of Civil Procedure, specifically Rules 9(h) and 38(e). Finally, it conflicts with the vast majority of district court decisions that have addressed this issue, including many declaratory judgment actions. The Fourth Circuit even acknowledged that the courts are split on the central issue in this case – whether a defendant may override a plaintiff's election, pursuant to Rule 9(h), to proceed in admiralty without a jury. *See* App. 12a-14a.

A. The Fourth Circuit's Decision Conflicts With *Harrison*

The *Harrison* decision upholds the rule that, when the same transaction or occurrence gives rise to a controversy that includes opposing claims by two or more parties that could be brought either in admiralty or at law, the election to proceed with or without a jury rests with the plaintiff under Rule 9(h). In its Brief in Opposition, Respondent contends that the Fourth Circuit's decision below is not in conflict with *Harrison*, because *Harrison* does not involve a declaratory judgment action. Contrary to Respondent's arguments, there is a clear conflict between the two circuits' decisions, and this conflict is demonstrated by a recent decision of the United States District Court for the Middle District of Florida, *Great Lakes Reinsurance (UK) plc v. Masters*, No. 8:07-cv-1662-T-24-MSS, 2008 WL 619342 (M.D. Fla. Mar. 3, 2008).

In *Great Lakes*, the insurer of a yacht filed a declaratory judgment action seeking a declaration that

it was not responsible for compensating the yacht's owner for damage to the vessel. The yacht owner filed a breach of contract counterclaim, alleging diversity jurisdiction and demanding a jury trial. In opposing a motion to strike the demand for jury trial, the yacht owner relied upon the Fourth Circuit's decision in this case. The court, saying that the *Harrison* decision was binding on it, granted the motion to strike:

> At issue in this motion is whether a defendant who has filed a counterclaim based on diversity jurisdiction may demand a jury trial when the plaintiff first filed an admiralty suit in federal court pursuant to Federal Rule of Civil Procedure 9(h). Masters argues that he has a Seventh Amendment right to have his breach of contract claim heard by a jury. Further, Masters argues that Great Lakes has undertaken "procedural fencing" to preclude Masters of his right to a jury trial. Masters' arguments are based largely on cases from the Fourth and Ninth Circuit Courts of Appeal. *See In Re: Lockheed Martin Corporation*, 503 F.3d 351 (4th Cir. 2007) (finding the plaintiff's designation of its declaratory judgment claim as an admiralty claim did not prevent the defendant from obtaining a jury trial on its counterclaim that arose at law); *see also Wilmington Trust v. United States District Court for the District of Hawaii*, 934 F.2d 1026 (9th Cir. 1991) (finding that a defendant's right to jury trial on its counterclaim trumps a Rule 9(h) election by a plaintiff if the defendant alleges an independent basis for jurisdiction). The cases Masters cites clearly articulate that the

> Seventh Amendment right to a jury trial trumps a plaintiff's Rule 9(h) election of a bench trial, but these non-binding cases are at odds with a case binding on this Court, *Harrison v. Flota Mercante Grancolombiana, S. A.*, 577 F.2d 968 (5th Cir. 1978).
>
> . . . .
>
> After careful consideration, the Court finds that Great Lakes' election to proceed in this declaratory action without a jury pursuant to Rule 9(h) trumps Masters' demand for a jury trial on his counterclaim.

Great Lakes, 2008 WL 619342, at *1-*2. Given that district court's acknowledgement of the conflict, there is no great judicial efficiency to be gained by further percolation of this issue. Whichever way the Eleventh Circuit might go in any appeal out of the *Great Lakes* case, it will only deepen the conflict, not resolve it.

B. The Fourth Circuit's Decision Conflicts With *Waring*

This Court in *Waring v. Clarke* held that the Seventh Amendment does not apply to admiralty cases, even when there is concurrent jurisdiction with the law side of the court under the "saving-to-suitors" clause, because there was nothing in the Constitution from which it could be inferred that suits in admiralty, being civil causes rather than common law causes, were ever to be tried to a jury. 46 U.S. at 460. The *Waring* Court also rejected the argument that the saving-to-suitors clause provided the defendant a right to a jury trial in an admiralty case. *Id.*

at 460-61. The *Waring* decision therefore stands for the proposition that the saving-to-suitors clause does not enable a defendant to force a trial by jury when the plaintiff has filed the suit in admiralty.

Now, with the decision below, a defendant in a declaratory judgment action filed in admiralty in the Fourth Circuit for which there is also diversity jurisdiction would be required only to demand a jury trial, which will thereby "force the plaintiff into a common law court" (*id.* at 461), and the Seventh Amendment will "be converted into an inhibition upon the mode of trial in suits which are not exclusively suits at common law" (*id.* at 460). *Waring* explicitly precludes that result. While Respondent argues that this Court's decision in *Waring* is "irrelevant," such an argument actually underscores the conflict that exists between *Waring*, on the one hand, and the Fourth Circuit's and Respondent's interpretation of *Beacon Theatres*, on the other.

C. The Fourth Circuit's Decision Conflicts With Traditional Admiralty Practice, Which The Current Rules Were Intended To Preserve

The Fourth Circuit's decision also conflicts with the plain language and intent of Rules 9(h) and 38(e) of the Federal Rules of Civil Procedure. Rule 9(h) allows a plaintiff in an action in which there is admiralty jurisdiction and some other ground for jurisdiction to identify the claim as an admiralty and maritime claim for the purposes of, among others, Rule 38(e). Rule 9(h), Federal Rules of Civil Procedure (2005). Rule 38(e), in turn, provides that: "These rules [including Rule 57] shall not be construed to

create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h)." Rule 38(e), Federal Rules of Civil Procedure (2005).

The Advisory Committee Note relating to the 1966 amendment to Rule 9, which added Rule 9(h), clarifies that, after the unification of the Admiralty Rules and the Federal Rules of Civil Procedure, a jury trial will not be imposed in cases in which it was not available before the unification:

> Certain distinctive features of the admiralty practice must be preserved for what are now suits in admiralty. . . .
>
> It is no part of the purpose of unification to inject a right to jury trial into those admiralty cases in which that right is not provided by statute. . . . The unified rules must therefore provide some device for preserving the present power of the pleader to determine whether these historically maritime procedures shall be applicable to his claim or not; the pleader must be afforded some means of designating his claim as the counterpart of the present suit in admiralty, where its character as such is not clear.
>
> . . . .
>
> . . . [T]he preferable solution is to allow the pleader who now has power to determine procedural consequences by filing a suit in admiralty to exercise that power under unification, for the limited instances in which procedural differences will remain, by a simple statement

> in his pleading to the effect that the claim is an admiralty or maritime claim.

Rule 9, Federal Rules of Civil Procedure, Advisory Committee Notes – 1966 Amendment. 39 F.R.D. 69, 75-76 (1966).

The adoption of Rules 9(h) and 38(e) preserved the historical maritime right and practice of trying cases filed on the admiralty side of a federal court without a jury. The Fourth Circuit's decision below conflicts with this important and historical admiralty right and practice, and this Court should grant this petition for writ of certiorari, so that it may review that decision.

II. A DECLARATORY JUDGMENT ACTION IS NOT IMMUNE FROM THE RULE THAT A JURY TRIAL IS NOT AVAILABLE IN ADMIRALTY

That this case was filed as a declaratory judgment action cannot overcome the fact that the jurisdictional basis for this action, and the procedures invoked by the plaintiff upon filing this action, was the admiralty and maritime jurisdiction of the federal court.

Prior to 1961, it was not clear that a declaratory judgment action could be entertained in admiralty. After the enactment of the Declaratory Judgment Act in 1934, some courts questioned whether the declaratory judgment remedy was available in cases filed in admiralty. *See Streckfus Steamers v. Mayor of Vicksburg*, 81 F.2d 298, 299 (5th Cir. 1936) ("[I]t is at least doubtful whether courts of admiralty are within the new act."); *McLain v. Lance*, 146 F.2d 341, 343 (5th

Cir. 1944) ("Likewise there is much uncertainty as to whether or not a court of admiralty is authorized to render a declaratory judgment."), *cert. denied*, 325 U.S. 855 (1945). By the 1950s, however, the trend in the courts seemed to be in favor of declaratory judgment actions being cognizable in admiralty. *See, e.g., American-Foreign S.S. Corp. v. United States*, 291 F.2d 598, 604 (2d Cir.) ("Furthermore, the wording of the Declaratory Judgment Act makes it broadly applicable to 'any court of the United States' which would include, presumably, the admiralty courts."), *cert. denied*, 368 U.S. 895 (1961); *Providence Washington Ins. Co. v. Lovett*, 119 F.Supp. 371 (D.R.I. 1953) (declaratory judgment action in admiralty as to a yacht hull policy).* *Cf. States Marine Lines, Inc. v. United States*, 196 F.Supp. 562, 563 (N.D. Cal. 1960) ("Whatever the merit of the contention that declaratory judgment proceedings ought to be available in admiralty action, that proposition does not seem supported by past decisions.").

In 1961, the Advisory Committee recommended that the Admiralty Rules be amended by adding, *inter alia*, a new rule dealing with declaratory judgments. As to its reason for making that recommendation, the Advisory Committee stated:

> The summary judgment and the declaratory judgment are generally regarded, and are regarded by the Committee, as valuable features of a modern procedural system which should be available in admiralty as well as in civil cases.

---

* As all of these cases were in admiralty, they necessarily were tried without a jury.

29 Moore's Fed. Prac. § 701.04[3] (3d ed. 2008) (quoting Advisory Committee's Reasons for Recommending Rule 58 Authorizing Summary Judgments, and Rule 59 Authorizing Declaratory Judgments).

Following that recommendation, this Court enacted Admiralty Rule 59, which was essentially identical to Rule 57 of the Federal Rules of Civil Procedure. Critically, the Advisory Committee Notes to Admiralty Rule 59 made clear, two years after *Beacon Theatres* was decided, that the allowance of a declaratory remedy in the admiralty courts was in no way intended to alter the traditional admiralty practice of trial before the court:

> In general, of course, there is no right to jury trial in admiralty, and the adoption of this rule will confer no such right. In a narrowly defined class of admiralty cases, however, a statutory right to jury trial has existed since 1845. *See* 28 U.S.C. §1873 (the "Great Lakes Act"), derived from 5 stat. 726-27. Although the matter may be of limited practical importance, it seems appropriate to preserve the reference to jury trial in this rule because of the existence of the statutory right, more so since preservation of the reference preserves uniformity as between this rule and the corresponding civil rule.

29 Moore's Fed. Prac. § 701.04[3] (3d ed. 2008) (quoting Advisory Committee Notes).

After Admiralty Rule 59 came into effect, the courts sitting in admiralty handled a wide range of declaratory judgment actions – all without a jury.

See, e.g., Marine Transp. Lines, Inc. v. Nunes, 211 F.Supp. 156 (N.D. Cal. 1962) (libel by an employer against employees with maritime attachment); *Brunson v. Iowa Home Mut. Cas. Co.*, 224 F.Supp. 592 (S.D. Ala. 1963) (stevedore's declaratory judgment action against its liability insurer); *Shinnihon Kisen, K.K. v. Jarka Corp.*, 1964 A.M.C. 1455 (D. Mass. 1964) (vessel owner action against a stevedore seeking declaratory judgment for defense and indemnity); *Risdal v. Universal Ins. Co.*, 232 F.Supp. 472 (D. Mass. 1964) (declaratory judgment action brought by insured against insurer under a marine hull policy); *Cia Aeolia de Naveg. S.A. Panama v. John T. Clark & Son of Boston, Inc.*, 250 F.Supp. 808 (D. Mass. 1964) (vessel owner seeking declaratory judgment for defense and indemnity from a stevedore).

In 1966, of course, the Admiralty Rules were merged with the Federal Rules of Civil Procedure, and Admiralty Rule 59 was rescinded in favor of Rule 57 of the Federal Rules of Civil Procedure, which referenced Rule 38, which now included Rule 38(e). Thus, when the existing admiralty practice of addressing declaratory judgment actions under Admiralty Rule 59 was merged into the similar practice under Rule 57 of the Federal Rules of Civil Procedure, the practice of these cases being tried before the court, without a jury, was preserved. *See, e.g., Insurance Co. of Pennsylvania v. Amaral*, 44 F.R.D. 45, 46-47 (S.D. Tex. 1968).

To the extent the Fourth Circuit's decision below stands for the proposition, as Respondent maintains, that declaratory judgment actions are an exception to the rule articulated in *Waring* and in *Harrison*, it is

plainly in conflict with the history of declaratory judgment practice in admiralty. That is a conflict that this Court should resolve.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

James W. Bartlett, III
Counsel of Record
Alexander M. Giles
Semmes, Bowen & Semmes
250 West Pratt Street, 16th Floor
Baltimore, Maryland 21201
(410) 539-5040

Matthew C. Crane
Bauer Moynihan & Johnson LLP
2101 Fourth Avenue, Suite 2400
Seattle, Washington 98121
(206) 443-3400

David C. Frederick
W. David Sarratt
Kellogg, Huber, Hansen,
Todd, Evans & Figel, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, DC 20036
(202) 326-7900

Attorneys for Petitioner
National Casualty Company